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MICHAEL RODAK, JR.

IN THE

Supreme Court of The United States

OCTOBER TERM, 1973

NUMBER 73-1027

STATE OF INDIANA
Petitioner,

vs.

HARRY ADAMS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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Petitioner, State of Indiana, prays that a Writ of Certiorari issue to review the Judgment and Opinion of the Supreme Court of Indiana, entered in these proceedings on the 10th day of August, 1973, Petition for Rehearing denied without opinion by the Supreme Court of Indiana on the 1st day of October, 1973.

OPINION BELOW

The Opinion of the Supreme Court of Indiana has not been officially reported. It may be found at 299 N.E. 2d

834. That Opinion and the ruling on the Petition for Rehearing are set out as Appendix A hereto.

JURISDICTION OF THIS COURT

The Opinion and Judgment of the Supreme Court of Indiana sought to be reviewed was issued on August 10, 1973. Petitioner's Petition for Rehearing was denied without opinion on October 1, 1973.

The basis for jurisdiction of this Court is found in 28 U.S.C. §1257(3), as interpreted in *California v. Stewart,* one of the cases consolidated and reported as *Miranda v. Arizona,* 384 U.S. 436 at 498 (1966).

Question Presented for Review

Whether the surgical removal of bullet fragments from the body of a suspect pursuant to a search warrant is unreasonable as a matter of law so as to violate the Fourth and Fourteenth Amendments to the United States Constitution?

Constitutional Provisions

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Constitution of the United States of America, Amendment IV.

Statement of the Case

On June 13, 1970, a grocery store in Indianapolis was held up by three armed robbers. The Sheriff's department received an alarm and several deputies arrived at the

scene. When the bandits left the store, a gun battle broke out in which one of the robbers and a deputy, Reserve Lieutenant Jimmy Wingate, were killed. It was believed that one of the other robbers was wounded in making his escape.

Respondent Harry Adams became a suspect in the case and was placed under surveillance. Several weeks later, Adams was arrested on another charge. During the booking process, Adams showered. At that time, police officers observed bullet wounds in his buttocks. An x-ray examination showed metallic fragments in the flesh.

Upon filing of a probable cause affidavit, a search warrant was issued for a surgical removal of those fragments. Under local anesthesia, certain tissue was removed. Examination of the tissue at the FBI laboratories showed the presence of lead fragments of the same composition as that of bullets used by the murdered deputy.

Adams objected to surgical examination and use of evidence obtained therefrom in the trial court by pre-trial motions and by objection to the introduction of the evidence at trial. Such evidence was admitted over the objection. The substance of the objections is presented in Appendix B hereto.

Adams was convicted of first degree murder and sentenced to life imprisonment. He preserved the constitutional question for appeal in his post-trial Motion to Correct Errors and presented the issue to the Supreme Court of Indiana. That court reversed the conviction and remanded for a new trial, stating:

> "Here an actual surgical operation was performed on the Appellant to remove a bullet from inside his body. We do not sanction a surgical operation forced on a defendant for this purpose. We therefore hold that the

> Fourth Amendment prohibits the type of intrusion into the body of the suspect as occurred in this case."
>
> See App. A at p. A-6.

The State filed its Petition for Rehearing addressed to this issue, which had also been addressed by the State in its brief on the merits of the appeal. The Petition for Rehearing was denied without opinion.

Argument

The issue in this case is whether this Court's opinions in *Rochin v. California,* 342 U.S. 165 (1952) and *Schmerber v. California,* 384 U.S. 757 (1966) prohibit, as a matter of law, the surgical search of the interior of a suspect's posterior, or other portions of his body. The State urges this Court to grant a Writ of Certiorari in this case since the Supreme Court of Indiana has decided a federal question of substance in a way not in accord with this court's decision of *Schmerber, supra,* or to the extent that *Schmerber* might not cover the question the Supreme Court of Indiana has decided a federal question of substance which has not been determined by this Court.

The Supreme Court of Indiana relied primarily on this Court's 1952 decision in *Rochin v. California, supra.* In that case, this Court stated the facts to be as follows:

> "Having 'some information that [the petitioner here] was selling narcotics,' three deputy sheriffs of the County of Los Angeles, on the morning of July 1, 1949, made for the two-story dwelling house in which Rochin lived with his mother, common-law wife, brothers and sisters. Finding the outside door open, they entered and then forced open the door to Rochin's room on the second floor. Inside they found petitioner sitting partly dressed on the side of the bed, upon which his wife was lying. On a 'night stand' beside

> the bed the deputies spied two capsules. When asked 'Whose stuff is this? Rochin seized the capsules and put them in his mouth. A struggle ensued, in the course of which the three officers 'jumped upon him' and attempted to extract the capsules. The force they applied proved unavailing against Rochin's resistance. He was handcuffed and taken to a hospital. At the direction of one of the officers a doctor forced an emetic solution through a tube into Rochin's stomach against his will. This 'stomach pumping' produced vomiting. In the vomited matter were found two capsules which proved to contain morphine."
>
> 342 U.S. at 166.

The case at bar bears only one surface similarity to that case in that each was a search within the body of a suspect. *Rochin* involved the additional elements that the police had no authority to take such action. The initial entry into Mr. Rochin's dwelling was unauthorized and no court order was obtained for the medical procedures. This case presents the opposite facts.

Rochin has been distinguished on these facts in many subsequent cases, several of which are discussed in the opinion of *People v. Jones,* 20 Cal.App.3d 201 (1971). The California court concluded that:

> "*Rochin* has been distinguished in numerous cases on the ground that it was concerned not merely with stomach pumping but with the entire course of events." 20 Cal.App.3d at 207.

Thus, *Rochin* is not applicable to the facts of this case.

Rochin should also be disregarded for another reason. That case was decided prior to this court's ruling in *Mapp v. Ohio,* 367 U.S. 643 (1961), in which the exclusionary rule under the Fourth amendment was applied to the states. Therefore, it was necessary to use subjective standards

and rely on such extrajudicial catch phrases as "shocking to the conscience." *Mapp* has negated any need to rely on such standards in search and seizure cases and therefore should be disapproved or limited by this Court.

The State would respectfully submit that this case should have been affirmed under the authority of *Schmerber v. California,* 384 U.S. 757 (1966). While the facts of that case involved the drawing from the body of a blood sample, the language and logic of the opinion apply generally to "intrusions into the human body." 384 U.S. at 767. This Court held that:

> "[T]he Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner."
>
> 384 U.S. at 768.

The *Schmerber* opinion set out certain further criteria to be considered, but these need not be examined in this case since the Supreme Court of Indiana held that any surgical intrusion is unreasonable as a matter of law. Thus, the standard of need for the material to be seized as set out by this Court was not considered at all. The only consideration presented therefore is whether the surgical technique is necessarily improper.

The record of this case shows the following testimony as to the procedure used in removing the bullet fragments:

A. The operation consisted of making an incision between these two points under local anesthesia, and removing tissue for examination from the body of Mr. Adams.

Q. Was tissue removed?

A. Yes.

Q. Would you describe the tissue?

A. The tissue was what we call a fatty or adipose tissue. It was kept within the realm of an inch to an inch and a half incision and not going down into the muscular structure of the body or going through any fascia planes that would potentially result in any injury to Mr. Adams, but this was superficial tissue, fatty tissue, that was removed. Some tissue of which was scar tissue that the body system builds up reaction to foreign particles and it doesn't like it so it's called indurated tissue, that's scar tissue.

(R. 1062, ll. 7-22)

Under such circumstances, at least, a surgical procedure is not significantly different from the procedure of drawing blood. On similar facts, the Supreme Court of Georgia affirmed a conviction in *Creamer v. State,* 229 Ga. 511 (1972), *Pet. for cert. dismissed.* The decision of the Supreme Court of Indiana should thus be reversed as improperly extending of the scope of the Fourth Amendment and as constradicting the ruling of this Court in *Schmerber.*

CONCLUSION

For the foregoing reasons, Petitioner, State of Indiana, prays that a Writ of Certiorari issue to review the Judgment and Opinion of the Supreme Court of Indiana entered in these proceedings.

Respectfully submitted,

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